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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 14.

FEDERAL TRADE COMMISSION,

Petitioner,

v.

STANDARD EDUCATION SOCIETY *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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THE COURT PRESS, N. Y. C.

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BRIEF FOR RESPONDENTS.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 486-492) is reported in 86 F. (2d) 692.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45), and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Criticism of Questions Presented.

The questions presented must be directed to the opinion of the court below. Because this was not done in the Petition for the Writ of Certiorari, we took exception in our brief opposing the Petition, to Petitioner's statement of the one question there presented. On page 2 of its Petition, the Federal Trade Commission had asserted the following as its question to the Court:

> "Are false representations to prospective purchasers of sets of books that they were to receive the books free and pay only for loose-leaf annual supplements so obviously false that they do not amount to an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act?"

In our reply to the Petition, we pointed out that such an issue had not been decided by the Circuit Court of Appeals for the Second Circuit, and therefore the question was improperly stated. The unanimous lower court did not hold that the representations in question were false, and did not state the rule of law embodied in the "question presented".

Finding entire absence of any possible injury to the public in respondents' retail combination sales method of offering to give free, an encyclopedia of ten volumes on condition that the purchaser buy the quarterly supplement for ten years, making ten additional volumes or twenty volumes in all, the court below could not find that any falsity existed in such method of respondents.

What the Court of Appeals, speaking through Judge Learned Hand, said was:

> "We cannot take seriously the suggestion that a man who is buying a set of books and a ten years 'extension service', will be fatuous enough to be misled by the *mere statement* that the first are given away, and that he is paying only for the second. Nor can we conceive how he could be damaged were he to suppose that that was true. Such trivial niceties are too *impalpable* for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils" (R. 489). [Italics supplied.]

Taking notice of our pointed exception to the misinterpretation of the opinion found in the question, and conceding in part the truth of our criticism, the petitioner has now in its present brief, rewritten the question in issue as follows:

> "Are false representations to prospective purchasers of a ten volume reference work and a loose-leaf extension service that the reference work is free and that only the extension service is to be paid for an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act?" (Pet.'s Br., p. 1.)

Despite the revision, it is clear that the vice inherent in the original question presented persists in the revised question above quoted, because petitioner still insists that the lower court has licensed respondents to use false and fraudulent representations. The court below did not hold that the representation was false. To the contrary, in the court's opinion, the practice involved no falsity, no misrepresentation, no deceit and above all, no possible damage to the purchaser. To the lower court, the problem presented was thought too trivial a nicety to concern the Federal

Trade Commission, a statutory body designed by Congress to stamp out substantial evils. A trivial nicety and "will-o'-the-wisp", the question remains, despite the facts that certiorari was granted and that petitioner attempts to justify it as a serious problem.

It is submitted that had petitioner's Question 1, conformed accurately to the decision of the court below, certiorari would not have been granted. The question fairly stated should read thus:

> "Does the sales practice of representing to prospective purchasers of 10 volume sets of encyclopedias with loose-leaf quarter-annual supplements for a ten year period which gives the buyer 10 additional volumes, or 20 volumes in all, that they are to receive the encyclopedias free on condition that they pay for the loose-leaf supplements, constitute an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act?"

Questions 2 to 4 (Pet.'s Br., p. 2) were assigned as errors in the Petition and were not, and by reason of their unimportance, could not be the basis for the Petition for the Writ of Certiorari. In our humble opinion, they are here merely to allow petitioner an opportunity to color the real issue sought to be presented by Question 1, by an unnecessary rehashing of the entire case which, for the most part, was decided in the Commission's favor.

We wish to point out, however, that even in the statement of one of these minor questions, Question 3, the decision of the Circuit Court of Appeals has been misconceived. Petitioner's Question 3 assumes that there is proof, in the record, that the contribu-

tions of some of the contributors to Aiton's Encyclopedia, the derivative work, were entirely omitted from the current derived work. There is absolutely no evidence and no finding that all the contributions of any one of the contributors to Aiton's Encyclopedia were omitted from the current encyclopedia. Judge Hand in his opinion wrote:

> "There were, however, a number who had been genuine contributors to 'Aiton's Encyclopedia', but who had done nothing later. How much of this earlier work went into the two later ones cannot be definitely ascertained, but it was the basis of them, and it seems to us not 'unfair' to announce as contributors to the derived work those who had been contributors to the original. This clause, ought therefore, to be modified or clarified by excepting from the prohibition contributors to 'Aiton's Encyclopedia'" (R. 490).

Question 3, to accord with the decision of the court below and with the record, should therefore be stated thus:

> "3. Should the seventh paragraph of the Commission's order have been modified so as to permit respondents to make representations that contributors of Aiton's Encyclopedia, the original and basic work, were contributors to the current Standard Encyclopedia, the derived work?"

As modified above, Questions 1 to 4 properly present the issues to the Court.

Statute Involved.

Section 5 of the Federal Trade Commission Act, approved September 26, 1914, c. 311; 38 Stat. 717, 719 (U. S. C., Title 15, Sec. 45).

Statement.

Because the issues involved in the instant case concern only a small portion of the statement made by petitioner, we deem it proper to give the Court a short resumé of the relevant facts, and of the action of the Circuit Court of Appeals for the Second Circuit, which is now under review.

It is well to comprehend that we are examining the business of corporate respondents that are firmly rooted in American business with many years of useful and practical achievement in the long, time honored business of placing into the homes of the American public 20 fine volumes of up-to-date encyclopedic material. The material is so practically presented and arranged that those among us of high school intelligence may quickly find in non-technical and simplified form, matters of world-wide knowledge and the current record of history in the making.

The Government does not challenge these facts or deny the great public good the corporate respondents have accomplished during the past 25 years of their business life during which time they have distributed over a hundred thousand sets of encyclopedias to the intelligent reading public.

The record established that in 1909, there was incorporated in Minnesota, under the name of Wells Brothers Publishing Company, a corporation which published an encyclopedia known as "Aiton's Encyclopedia", prepared by Professor George B. Aiton, then of the University of Minnesota faculty. The work was originally in 5 volumes (R. 388). In 1912, the name of the publication was changed to "Standard Reference Work" and it continued to be published and sold by the Wells Brothers Publishing Company.

In 1917, the corporate name of the Publishing Company was changed to the "Standard Education Society" (R. 379, 380).

About the year 1923, the encyclopedia was practically rewritten. It was then in ten volumes, two of which were exclusively devoted to matters especially for teachers (R. 388). At the same time, the Society began the preparation and distribution of looseleaf extensions, which were then issued semi-annually (later changed to quarter-annually) so that the encyclopedic material would be kept up-to-date. The books were again revised in 1925 and 1927. In 1929, the special teacher material was dropped from the set and the alphabetically arranged encyclopedic material was extended to fill ten volumes (R. 388). The publication is recopyrighted at least every two years as material changes are made (R. 387).

In 1929, after eliminating the two volumes of teacher material and expanding and enlarging the scope of the books to include strictly encyclopedic matter, it seemed appropriate to call the work an encyclopedia, and the name of the "New Standard Encyclopedia" was chosen. It was intended that the name of the corporation would be changed as had been done in 1917, but because of banking arrangements, this was impossible at the time. A new corporation, "not for profit" was therefore incorporated, bearing the name of "Standard Encyclopedia Corporation", under the Illinois eleemosynary corporation law.[1]

[1] That this non-stock, "not for profit" corporation was organized to evade any order that might be issued against the Standard Education Society was the baseless and imaginary inference drawn by the Commission in its findings. And, this inference is relied on by petitioner in its present brief in arguing that the organizers of the new corporation, including the bookkeeper of the Standard Education Society, were properly included in the "desist order". We shall deal with this untenable argument *infra*, under Point II in answering petitioner's Point III.

The Standard Encyclopedia Corporation was and is nothing more than a trade department of the Standard Education Society which remained the financial entity, handled all the sales, collected all the accounts and did everything else. Fundamentally, there was only one corporation (R. 404, 405).

The encyclopedias are sold largely on the installment plan by salesmen who call directly upon the purchasers, and as many as 500 different travelling solicitors are employed in a year.

Since the establishment of this large retail book business, it has met with encouragement and success. Its business does not in the nature of things, lend itself to obtaining customers by fraud because it has the customers for ten long years and must please them to win friends and make further sales. If, at the threshold, it deceives its customers that would end instead of begin ten years of steady business relationship.

Among its various activities, the respondent Standard Education Society has also conducted since 1924 a correspondence secretarial school, furnishing home study courses of instruction.

The individual respondents are H. M. Stanford, the president, a director, general manager and owner of 250½ out of Standard Education Society's 536 shares; W. H. Ward, the secretary, director, in charge of sales, and also the owner of 250½ out of Standard Education Society's 536 shares; and A. J. Greener, employed by Standard Education Society, as the company's auditor and cashier and who owns the remaining 35 shares of stock. Greener is a mere employee and not a director (R. 426, 427, 467).

The Commission's "cease and desist" order is directed against the two corporate and 3 individual

respondents and was issued after testimony had been taken and findings of fact made. The order comprised ten paragraphs and proscribed the nine alleged unfair methods of competition charged in the Commission's original and supplemental complaints.[2]

Briefly stated, the first and third paragraphs forbade representing the ten volume encyclopedias as given free and only the looseleaf quarter-annual supplements as paid for; the second forbade representing that some of the sets were delivered to selected persons; the fourth forbade representing the work as "a recently completed new and up-to-date encyclopedia"; the fifth, offering the same work under two names; the sixth, representing its usual price as higher than that at which it was offered; the seventh, representing any person as a contributor who was not a contributor; the eighth, representing any person as giving a testimonial who had not done so; the ninth, publishing other testimonials than those actually given; the tenth, representing the home study course of instruction as a "Special Introductory Enrollment" at a special reduced price.

The order was issued December 24, 1931. Nothing was done to enforce this order until January 20, 1936 when the Commission filed with the Circuit Court of Appeals for the Second Circuit its application for the enforcement of the aforesaid order in all its particulars. Respondents properly answered and the case was argued. On December 14, 1936 the court below, per Circuit Judge Learned Hand, rendered their unanimous opinion, affirming most of the paragraphs of the desist order. The court, however, re-

[2] Paragraphs 1 and 3 were treated by the court below as similar and were considered together as one practice.

versed Paragraphs 1 and 3 of the order relating to the first of the forbidden methods of competition on the ground that as a matter of law no unfair method of competition was involved. The eighth paragraph was eliminated from the order because the court could find for it "no support in the evidence" (R. 491). The seventh paragraph was modified in an unessential detail by exempting from its prohibition contributors to "Aiton's Encyclopedia", the original and basic work (R. 490). The court held that Greener being merely an employee and the chief bookkeeper of the Standard Education Society and having no connection with any of the alleged practices, was improperly enjoined by the order and it was completely reversed as to him. Further, since no connection was proved between Ward and the practices enjoined by the seventh, ninth and tenth paragraphs and between Stanford and the practice enjoined by the tenth paragraph, these paragraphs were modified by eliminating the individuals therefrom as indicated. Paragraph 10 was also amended to exclude any reference except as to price because there was no finding of fact to support the other prohibition contained therein (R. 491).[3]

Before decreeing enforcement of the parts of the order which were affirmed, *i. e.*, paragraphs 2, 4, 5, 6, 7, 9 and 10, the court below, in accordance with Section 5 of the Federal Trade Commission Act (c. 311, 38 Stat. 717, 719), and its long settled procedure, remanded the cause to the Commission as Special

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[3] In its Petition for a Writ of Certiorari, the Commission specified as error the modification of Paragraph 10 (Pet.'s Br., p. 11). In its present brief (p. 17), it disclaims any intention to discuss the errors assigned to this paragraph. We may therefore assume that petitioner is content to allow Paragraph 10 to stand as amended by the court below. We likewise will therefore refrain from discussing the said paragraph.

Master to report whether the respondents have complied with the provisions sustained.[4]

Thus, although many of the provisions of the order were affirmed, no final action has as yet been taken thereon by the lower court. Consequently, respondents have not filed in this Court a cross petition. No question can be, or is intended to be, raised by respondents now as to the affirmed provisions of the order. For the purposes of the present appeal initiated by the Commission, all matters decided in its favor are unquestioned by respondents and assumed to be correct. As petitioner itself admits on page 17 of its brief, "To the extent that the Commission's order was affirmed by the court below, it is, of course, not now before the court".

Despite this declaration by petitioner, its brief is replete with references for support to the affirmed portions of the order. It cannot be urged too strongly that only the questions formally presented by petitioner are now before the Court (*Helvering* v.

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[4] *Errors Abandoned by Petitioner.* In the Petition for the Writ of Certiorari, petitioner had assigned as errors, the lower court's adherence to their settled procedure whereby they refuse to determine a disputed issue of compliance with the desist order, before reviewing the validity of the order (Errors 6 and 8, Petition, pp. 11 and 12). The court first determines whether the order is valid and if valid, remands the cause to the fact finding body, the Commission, to sit as Special Master and to report its finding to the court for further action. (See *Federal Trade Commission* v. *Balme* (C. C. A. 2), 23 F. (2) 615, 618). Error was also assigned to the court's refusal to treat respondents' prayer that the desist order be vacated, contained in their joint answer to the Commission's Application for the enforcement of its desist order, as a waiver of their right to insist that non-compliance with the order be proved as a condition precedent to the granting of the Commission's Application [Error 7, Petition, p. 12]. These errors must be deemed to have been abandoned by petitioner since no reference and no argument relative thereto are stated in its present brief. Petitioner now evidently concedes the propriety of these rulings of the Court of Appeals.

Taylor, 293 U. S. 507, 511). There is at present no dispute with any other matter and petitioner may not properly reiterate and reargue the forbidden practices of the order, which are not before us and which for present purposes, are conceded to have been correctly affirmed by the court below.[5]

We will, therefore, in the ensuing argument, confine ourselves specifically to the four questions presented by petitioner to this Court.

Summary of Argument.

Point One.

The court below correctly held that it is not an unfair method of competition for a tradesman to offer to give away one thing free on condition that the customer buy something else. Such a sales inducing method is time honored, and is not fraudulent, deceitful or against public policy. *People* v. *Gillson* (1888), 109 N. Y. 389; *Long* v. *State* (1891), 74 Md. 565; *Commonwealth* v. *Emerson* (1895), 165 Mass. 146; *Boon-Iseley Drug Co.* v. *Doughton* (1925), 189 N. C.

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[5] Similarly the collateral issues decided against respondents form no part of the present case. Thus, the court below decided that respondents' practices constitute methods of competition in commerce. This decision cannot now be questioned by respondents and they are at a loss to understand why petitioner devotes an entire point of its Argument, Point II, to prove that the court was correct in deciding in its favor. Therefore, no argument answering petitioner's Point II is contained in this brief.

The court below also held that the corporate respondents are responsible for the acts and conduct of the agents and of the independent dealers. And, although this holding cannot now be questioned by respondents, petitioner devotes pages of its brief (pp. 9, 10 and 24) to reargue this point upon which it had met with complete success below. Presumably, the Commission's only purpose is to include what it considers questionable conduct on the part of the respondents to strengthen its unsecure case before this Court, irrelevancy and immateriality notwithstanding.

720. The whole question is insubstantial, impalpable and as the Court of Appeals believed, a will-o'-the-wisp which diverts attention from substantial evils (R. 489). *Northam Warren Corp.* v. *Federal Trade Commission,* 59 F. (2d) 196; *Flynn & Emrich Co.* v. *Federal Trade Commission,* 52 F. (2d) 836.

There is in the combination, "free on condition" method of retail salesmanship nothing that approximates the unfairness and fraud present in petitioner's cited cases of *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483; *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212; *Federal Trade Commission* v. *Keppel & Bro.,* 291 U. S. 304; *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67.

The "free on condition" representation is true. The purchaser is told just what he is to get and how much he is to pay. There is no distinction between the free offers petitioner concedes to be legitimate and the offers involved in the instant case. Indeed, the Commission's recent complaint, *"In the Matter of Askins Retail Stores Inc.,"* Docket 3225, in effect, belies petitioner's concession, for there, the Commission has charged, as the sole unfair method of competition, the use of that which petitioner describes as a "legitimate" free offer. Respondents' customers and especially the Commission's six star witnesses whose testimony is quoted in petitioner's brief (pp. 31-35), were not deceived.

Since no fraud is present in the method here concerned, familiar fraud principles and cases, cited by petitioner, are wholly inapplicable. Fraud cannot be presumed and cannot be forced into this case by the reiteration of cases which relate to deliberate fraud.

The case of *John C. Winston* v. *Federal Trade Commission,* 3 F. (2d) 961, is in all respects similar to the case at bar and was explicitly followed by the court below. Both, the court below and the Third Circuit Court of Appeals in the *Winston* case, properly considered the free on condition method independently and by itself. Both courts found the method not unfair. *Consolidated Book Publishers* v. *Federal Trade Commission,* 53 F. (2d) 942, is not in point. There, the "bare practice" questioned in the instant case was not considered separately.

Point Two.

The court below committed no error in excluding respondent Ward from the seventh and ninth paragraphs of the order since they could find no evidence connecting him with the practices there prohibited. The cases cited by petitioner, such as *McCandless* v. *Furland,* 296 U. S. 140, are clearly not controlling, for the business of the corporate respondents is an old established one, having been in existence for more than 25 years. During the five years (1924-1929) covered by the complaints, the Standard Education Society was not under the control of Stanford and Ward. There were, during that time, numerous stockholders and various directors and officers.

Greener was a mere employee and his exclusion from the order was proper. That he was an incorporator of Standard Encyclopedia Corporation is of no moment. The incorporation of the Standard Encyclopedia Corporation afforded no reason for Commission's fears that it was a device to evade an order that might be issued against the Standard Education

Society. As a matter of fact, the corporation was formed for a lawful purpose on behalf of the Standard Education Society, and as a matter of law, evasion was impossible. *Federal Trade Commission* v. *Hoboken White Lead and Color Works, Inc.*, 67 F. (2d) 551.

The Commission's Finding 20 is not based on any evidence. It cannot be supported solely by an inference from testimony contradicting the finding. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67; *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52.

Point Three.

The court's modification of paragraph seventh of the desist order, so as to exclude therefrom contributors to Aiton's Encyclopedia, was reasonable and necessary. There is no evidence in the record that all the contributions of any one contributor to Aiton's Encyclopedia, the basic work, was omitted from respondents' current publications, the derived works. Although petitioner now states that it is concerned only with contributors to Aiton's whose work was not carried over, the Commission in the court below urged that all contributors to Aiton's were improperly represented as contributors to the present works. It is obvious therefore that petitioner has no real grievance as to the modification of this paragraph of the order.

Point Four.

There was no evidence to support paragraph eighth of the order which forbade the representation that any person had recommended respondents' publication

when such was not the fact. The court is not bound to regard legally inadmissible evidence as supporting a desist order. An order to be binding must be supported by legally admissible evidence. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568; *International Shoe Company* v. *Federal Trade Commission*, 279 U. S. 832; *Arkansas Wholesale Grocers Ass'n.* v. *Federal Trade Commission* (C. C. A. 8), 18 F. (2d) 866, 871.

Argument.

Introduction.

The Commission seeks in this Court of last resort to change the issues joined and tried in its proceedings, which are apparent from its complaints, findings of facts and order to cease and desist. The issues were that respondents, in the sale of their products employ ten certain specified "methods", which "constitute unfair methods of competition" and not that of a conspiracy or scheme to defraud. On this theory, testimony was taken, findings of facts were made declaring the alleged practices to be "unfair methods of competition", and a cease and desist order was issued specifically prescribing in separate paragraphs each of the alleged unfair methods of competition. The court understood the issues and in their opinion state:

> "The order to 'cease and desist' included all the respondents, and forbade ten kinds of trade practices" (R. 487).[6]

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[6] There is a typographical omission at R. 487 in the report of the court's opinion. The word "ten" is omitted from the line immediately preceding the phrase "kinds of trade practices". See 86 F. (2d) 692, 694.

At no time did the Commission charge or find that a conspiracy existed or that the acts or practices, whether lawful or unlawful, were done pursuant to a "fraudulent selling scheme", as the petitioner now essays to argue in one part of its brief at pages 22 and 23, although at page 20 it states: "The practices of respondents constitute *methods* of competition". Under the theory of the case, as tried and as decided by the Circuit Court of Appeals, each alleged unfair method of competition must stand or fall on its own feet; it cannot be aided by a belated, futile attempt to charge respondents with a common design and conspiracy. If any of the practices are not unfair, proscription of them by the Commission is unwarranted, regardless of how reprehensible any accompanying method employed may be. The remedy is easily at hand, for if the unfair methods are excised, only fair methods remain, and there would be no reason then to argue that the fair methods must fall with the unfair. A business concern as large as this, with hundreds of salesmen in the sale of its wares, may and does employ various sales methods. Some may be legitimate, while some may innocently come within the pale of Section 5 of the Federal Trade Commission Act. Surely, no more should or could be demanded by the Commission than that the unfair methods alleged in the complaint be stopped.

The entire brief of petitioner reflects a studious and labored attempt to refuse to permit the only important issue in the case, which is found in Question 1 of its Questions Presented (Pet.'s Br., p. 1), to be decided upon its own merits or demerits. Whether the open and clearly stated "free on condition" sales approach is fair or unfair depends wholly on this particular method of competition. Recognizing the present

weakness of its position, petitioner devotes a whole section of its brief (pp. 59-61) to argue that this method is only a part of an integrated scheme, although it admits that probably standing by itself, this method might not be unfair (p. 60). Adopting from the law of fraud the irrelevant concept, that to prove a case in fraud, all the representations need not be false or material or induce the sale, so long as there is a material false representation, petitioner apparently urges that, since the "free on condition" method was used in connection with other methods, it must fall with them. The essential fallacy is, of course, that in the law of fraud, the plaintiff seeks damages and proves his right thereto if he can establish only one material misrepresentation. That other truthful representations were used in addition to the misrepresentation will not prevent recovery. Here, the Commission does not seek damages. Its purpose is prophylactic in that it seeks to protect the public and competition from unfair practices (*Federal Trade Commission* v. *Klesner,* 280 U. S. 19). It does not perform its function by prohibiting the fair along with the unfair. For the Commission's laudable purposes, the public and competition are protected by prohibitions against only the unfair practices.

Further, if as petitioner argues, the particular method is a part of an integrated scheme would it go so far as to say that the use of this method by and of itself would be a violation of the order. Since it most certainly would, the bubble of integration bursts of its own labored and artificial treatment.[7]

[7] As a matter of fact, as recently as September 13, 1937, the Commission issued a complaint, Docket No. 3225, entitled, *In the Matter of Askins Retail Stores, Inc.*, charging as the sole unfair method of competition, the use of "free on condition" advertising, independent of any other representations.

Petitioner in its brief in Question 1, asks this Court to decide whether the "free on condition" sales representation is an "unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act". That is the sole issue and not whether in combination with other methods, or pursuant to a fraudulent scheme, it should be condemned. The court should consider only that question which petitioner has presented (*Helvering* v. *Taylor,* 293 U. S. 507, 511).

The lower court correctly treated each paragraph of the desist order independently to determine whether the several methods forbidden by the Commission constituted, as a matter of law, unfair methods of competition. This is the recognized duty of the Circuit Court of Appeals in dealing with Commission orders.

> *Federal Trade Commission* v. *Gratz, et al.,* 253 U. S. 421;
> *Federal Trade Commission* v. *Curtis Publishing Co.,* 260 U. S. 568.

The paragraphs of the desist order which the court believed were supported by findings based upon testimony, and constituted unfair methods of competition, were affirmed. Paragraphs 1 and 3 dealing with "free goods on condition" sales advertising did not in the court's opinion amount to an unfair method of competition, and consequently, the court eliminated these two paragraphs from the order (R. 489, 492). It is submitted that the Court was bound to consider each practice separately, because the Commission, itself, had set out the practices separately in its order. The Court had no other alternative.

Petitioner fails, at page 22 of its brief, aptly to state or fairly to characterize the substance of the decision of the court below on the "free goods on condition" question now in issue. The court clearly did not single out this one "particular falsehood" for preferential treatment; the court denied that there was any falsehood involved in it. It held that the so-called "free offers" were not an unfair method of competition. In other words, the particular method is not unfair, is not false, is not deceptive, does not restrain substantial competition in commerce, and public policy does not require its prohibition. Petitioner does not prove the method unfair or the opinion of the lower court incorrect by reading into the opinion what is not there. Nor does it prove the representation in question false merely by labeling it false over and over again.

POINT ONE.

For a tradesman to offer to give away one thing on condition that the customer buy something else, is a time honored, customary sales inducing medium that is not fraudulent or deceitful or against public policy.

[Answering Petitioner's Point I.]

Respondents admit that representations were made by the agents to prospective purchasers, that the sets of encyclopedias would be given to them, free on condition that they pay for the looseleaf quarter-annual supplements to be supplied to them for ten years, and aggregating at the end of that period ten additional, or twenty volumes in all. The Commission's witnesses so testified. Thus, the testimony of Blanche

Guertin quoted by petitioner at page 33 of its brief is typical. She stated:

> "She told me I was getting the books, the ten volumes, as a gift, I understood, and I was to pay $69.50 for the ten years' extension service" (R. 227).

Respondents contend, and the court below so held, that there is no unfairness in such combination offers and their use does not substantially affect interstate commerce, and does not constitute an unfair method of competition.

The Commission was designed to eradicate substantial evils affecting interstate commerce. It is not given broad and sweeping censorship of all business ethics and its enabling statute "does not purport to establish a decalogue of good business manners or morals" (*Northam Warren Corp.* v. *Federal Trade Commission,* 59 F. (2d) 196, 198). Further, as has been aptly stated:

> "It was never intended that the Commission should act the part of a petty traffic officer in the great highways of commerce."
>
> *Flynn & Emrich Co.* v. *Federal Trade Commission,* 52 F. (2d) 836, 838.

Nothing of substance is here involved. The representations present an instance of an ancient, innocuous combination sales approach, which merely enables a salesman to gain an audience. Everybody knows about it. It has never even been bad business manners to offer special sales or special inducements by free offers. It is typically American to do so.

The lower court realized this, and declared that "pedantic scrupulosity" and "too solicitous a censorship" on the part of the administrative agencies do not fit in with the American system of government, and might if sanctioned, pave the way to unwelcome arrogance. The court stayed the Commission's interference with non-existent evils and restrained the Commission from its excessive show of power. Judge Learned Hand, writing the opinion for the unanimous court, chided the Commission for its impractical absurdity, saying (R. 489):

> "It is true that the Commission is not to sanction unfair trade practices merely because they are of long standing; its duty is to bring trade into harmony with fair dealing. *Federal Trade Com.* v. *Winsted Hosiery Co.*, 258 U. S. 483, 493, 494. To the discharge of that duty it should not, however, bring a pedantic scrupulosity; too solicitous a censorship is worse than any evils it may correct, and a community which sells for profit must not be ridden on so short a rein that it can only move at a walk. We cannot take seriously the suggestion that a man who is buying a set of books and a ten years' 'extension service', will be fatuous enough to be misled by the mere statement that the first are given away, and that he is paying only for the second. Nor can we conceive how he could be damaged were he to suppose that that was true. Such trivial niceties are too impalpable for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils."

Petitioner seeks to circumvent the effect of the court's proper decision by refusing to accede that it is dabbling in trivial niceties. The Commission,

being embarrassed, and although without evidence of fraud, seeks to convince the Court that this is a clear case of fraud comparable to the fraud that must be proved in an action at law, and therefore clearly within the passing off cases heretofore decided by this Court.

The "give away on condition" or "free on condition" retail sales method bears no indicia of fraud or deception, nor is it opposed to good morals. Americans are quite accustomed to buying in this way.[8]

It will not take long for the Court to be convinced that *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, where cotton was palmed off for wool, is not here relevant. Neither is *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, where the candy lottery method was shown to have cheated children in the "penny candy trade", and to have instilled in them a gambling spirit. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, where the origin of goods was falsely misrepresented, and *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, where yellow pine lumber was passed off for white pine, upon which the petitioner leans for its greatest support, are similarly, of course, not in point at all. The "yellow pine" case is just another example of selling brass for gold.

Here, we simply have the question of a purchaser seeking to buy an encyclopedia with looseleaf supple-

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[8] See *People* v. *Gillson* (1888), 109 N. Y. 389 (a cup and saucer were given away with a sale of two pounds of coffee); *Long* v. *State* (1891), 74 Md. 565 (crockery was given away with sales of coffee); *Commonwealth* v. *Emerson* (1895), 165 Mass. 146 (a photograph was given away with a purchase of tobacco); *Boon-Iseley Drug Co.* v. *Doughton* (1925), 189 N. C. 720 (Rexall penny sales—offering two things for the price of one plus a penny).

ments for a ten years period, who gets exactly what he wants for a price he evidently believes to be reasonable and for which he signs a written contract. The sales method involved being merely that the purchaser is told he will get the encyclopedia free *on condition* that he pay for the supplement.[9]

It is incontrovertible that the meaning of the words, "unfair method of competition" must be interpreted in the light of sensible usages. It has been the common custom of our country for generations, for business men, as a sales inducing medium to give away goods free on condition that other goods are purchased. The court will take judicial notice (see *New Jersey Asbestos Co.* v. *Federal Trade Commission* (C. C. A. 2), 264 Fed. 509) of the fact that for many years our great daily and Sunday newspapers have published advertisements in which merchandise is offered "free on condition".

Hundreds of thousands of dollars are spent annually in this form of advertising. If it is fraudulent, then the great daily newspapers and magazines are fostering and participating in frauds. Every publication in this country of any consequence accepts and carries such combination advertisements which offer to give something free in consideration of a purchase

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[9] It is important to note that the purchaser is not getting something that is merely "just as good" or equivalent. He is getting exactly what has been offered him. Therefore, such cases as *Wilson* v. *U. S.*, 190 Fed. 427 (Pet.'s Br., p. 50), are inapplicable, and lay down no rule contrary to respondents' contention. There the property was not of the value represented. That it may have been worth what the purchasers paid is, of course, not the test. As the court there said, the purchasers "would not obtain that which they were promised" (p. 434). Nor is the case of *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, cited by petitioner at page 52 of its brief, apposite to the case at bar. There the court found that sales were induced by deliberate falsehoods as to existing facts and the disparagement of the merchandise of competitors.

of another article or a subscription to a book club, such as the Literary Guild or the Book-of-the-Month Club, etc. The Appendix, *infra*, page 59 *et seq.*, contains a representative collection of prevailing advertising of the nature here in issue. They relate to matters as diverse as books and bungalows. The Sunday and Monday editions of the New York Times for October 3 and 4, 1937, carried full page "combination" advertisements, offering to give a book "free on condition" that the purchaser obligate himself to the purchase of at least four other books during the course of a year.

Such American sales inducing practices acquiesced in and established over a long period of time do not deceive or damage prospective purchasers and should not be the concern of the Federal Trade Commission. A trader must be given some leeway in the sale of his wares and if his method is not fraudulent, deceptive or immoral he should not be interfered with by a governmental agency.[10]

Expert business umpires such as the Commission, fail, sometimes, to understand that business cannot be encouraged to go ahead if tangled up with too much

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10 Courts do give leeway to merchants in the sale of their merchandise. Respondents referred, in the court below, to the legal sanctions afforded the merchant in the "time honored custom" of "puffing his wares" (*Ostermoor* v. *Federal Trade Commission*, 16 F. (2d) 962). Petitioner now devotes three pages of its brief, pages 50-53, to prove that fraudulent statements of fact can never be excused as mere puff. With this proper principle, respondents fully agree, but contend that the principle has no application to the sales method concerned. The method at bar contains no fraudulent misstatement of fact. Since the presentation is wholly fair, it need not be justified as trade puff. The fact that trade puffing is permissible within certain limits proves that our courts do give merchants leeway in permissible expressions in the sale of wares. Nothing more is contended for here.

harness. Judge Hand so informed the Commission (R. 489):

> "* * * a community which sells for profit must not be ridden on so short a rein that it can only move at a walk. * * *."

A. Representations not false—Respondents' customers are not deceived.

Petitioner's brief is based on the assumption that the "free on condition" representations employed by respondents are false, fraudulent and deceptive, and hence unfair. It is now willing to concede for the first time, that certain free combination offers may be fair and legitimate but argues that respondents' representations do not fall within this legitimate category.

The Commission's half-hearted concession shows the Government's hopeless dilemma, for the so-called "*genuine* offers, to give something away free of charge" (Pet.'s Br., pp. 38, 39), which the Commission believes are not unfair do not differ in kind from the offers involved in the case at bar. In both, there is a representation that one part of a combination is "free"; in neither, is the "free" part unqualifiedly free; in both, the cost of the article represented to be "free" is retrieved, and absorbed in the price charged for the other part of the combination; in both, there is the possibility that without the use of the word "free", the combination might not have been sold and an audience with the purchaser might not have been obtained. Any other distinction, which the petitioner has ingeniously devised, is a distinction without a difference. In both, the buyer knows exactly what he is getting and how much he is paying.

That the Commission itself does not agree with the point of view expressed for it, at pages 38 and 39 of its brief, where it is stated that certain combination "free" offers are legitimate while others are not, is manifest from a very recent complaint issued by the Commission. That complaint, *dated September 13, 1937,* is Docket No. 3225, and is entitled, *"In the Matter of Askins Retail Stores Inc."* The Commission there seeks to enjoin the respondent company from offering to give away free, a man's hat with the purchase of a suit or topcoat, and a dress with the purchase of a lady's coat. The theory of this complaint is diametrically opposed to petitioner's pretended demarcation of free offers. Irrespective of what may appear in the Government's brief as to the Commission's position in these matters, the Commission undoubtedly believes that *all* combination "free" offers, including those set forth in the Appendix, are so reprehensible as to warrant its action in removing this type of advertising from the commerce of the country. The policy of the Commission, declared in the foregoing complaint, literally takes the heart out of the argument made by petitioner in its brief on the question of the legality of combination "free" offers.

Certainly, respondents' customers, each and every one of them—the handful of dissatisfied and the thousands of satisfied ones, *knew that they were not getting something for nothing,* for they were told and were agreeable, at the time that each contract was signed, to pay a substantial sum to get that which was described as "free on condition". Everybody knows that many people who buy books and sign contracts, change their mind and seek to find unfair ways of reneging and disowning their bargains. Every business is afflicted with this type of customer.

Petitioner cannot point to a single instance where a purchaser was induced to believe that he was getting the ten volumes of the encyclopedia for nothing. Petitioner has searched the record and in its present brief quotes, at pages 31 to 35 inclusive, what it evidently believes are its six most damaging witnesses against respondents. Even though badgered and led by the prosecuting attorney for the Commission, an examination of the testimony of these witnesses reveals no deception, no misrepresentation and no fraud.

Thus, Miss Alice Sterling actually paid the salesman *$5.50* at the time she was offered the "gift" (R. 255-256, Pet.'s Br., pp. 31-32). She knew she could not get either part of the combination unless she paid out money. She knew it *before she signed a contract* which stated in specific terms how much money she was to pay and what books she was to get. Yet, she, secretary of a Y. W. C. A. signed the contract, and later changed her mind about the books [without having seen them (R. 256)], because she realized after the salesman had gone, *not that she had been misled,* but that she did not think she could live up to the terms of the contract (R. 255). Clearly, this lady's testimony belies any deception or falsity on respondents' part as a result of the method in question.

Mrs. Lucy Staples Wilbur's testimony (p. 32) emphasizes that she realized she had to pay money to get the books. Mrs. Wilbur merely refused to accept the books because the articles in them were not signed by certain well known educators as were the articles in some other reference book (R. 351). Was this woman deceived by the "free offer on condition"? Of course not.

Miss Elsie Anderson testified that she was told by

the agent that she would get the books "free", but must pay $69.50 for the looseleaf extension service (R. 352). This customer, as in the cases of all, was not under the delusion of getting something for nothing. She also signed a contract whereby she knowingly agreed to pay $69.50 in return for which she was to get the encyclopedia and the ten year supplement service (R. 357). All of these facts, she admitted, were set forth in the contract (R. 358). She refused to keep the books because she thought "they were not up to date, and the pages were not numbered, the binding wasn't good and so forth" (R. 357).

Petitioner quotes from the testimony of Mrs. Blanche Guertin who made no complaint about her bargain, but simply stated that she knew she "was to pay $69.50 for the ten years extension service", in order to get "the ten volumes as a gift" (R. 227). Respondents do not question that such representations were made, but insist that there is no unfairness in them. Certainly, Mrs. Guertin's concluding testimony displays no feeling on her part that she had been cheated or treated unfairly. She testified that *she never made any complaint and had no complaint to make.* In fact, she said:

> "I was not dissatisfied with the books at all" (R. 230).

Mary Gambee, petitioner's next quoted witness, fully understood that she was to pay money to get the looseleaf supplement and the books. She signed a contract the terms of which were clear to that effect, although she says she didn't understand it was a contract; she merely signed a paper "to give them my name and address, so that they would know *the*

amount that I was to pay each month" (R. 113). The reason she had the books returned without inspecting them was because he "didn't feel she could afford them". It is natural, we presume, but hardly truthful, for the witness to testify months after the contract had been signed in 1928 and while the company was still trying to recover on its contract, that, had the books and the extension service been offered to her for sale, she would not have accepted. The question and the witness' monosyllabic negative answer were properly stricken from the record by the trial examiner, for the answer was a mere conclusory guess by a purchaser who had regretted her purchase because she realized, some time afterwards, that she could not afford the books. Far from proving reliance, as petitioner would have it, the witness' "No" proves that when people refuse for one pretext or another to pay their just debts, it is easy to have them answer in a way which they believe will let them out.

Commission's next and last star witness, Miss Opal Bryson, is similarly of no assistance to establish fraud. She knew she was not getting something for nothing and no one tried to make her believe to the contrary. She testified that she gave the agent a check for $9.50 on signing a contract (R. 116). Without waiting for the books to come, she stopped the check and wrote to the Company that she "didn't want the books" (R. 116, 117). Her identical negative answer to the Commission's identical leading question, whether she would have accepted the proposition had the agent offered to sell her the books and the looseleaf supplement for $69.50, was likewise stricken by the Commission's examiner, as inadmissible, and properly forms no part of the record. This

witness at the time of signing the contract, agreed to accept the exact proposition she later decided she didn't want, and then asserted she would not have accepted in the first place.[11]

Upon such and similar testimony, the court below came to the only proper conclusion, that no unfair method of competition was involved in the "free on condition" sales approach under review. Not even a superficial indication of fraud could have been found from such testimony.

Respondents in using the "free on condition sales representations" were not committing "deliberate falsehoods", as petitioner would have this Court believe (Pet.'s Br., p. 23). They were using a legit-

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11 Only the testimony of Mrs. Guertin, *supra*, page 29, was subjected to cross examination, for this particular hearing was held in respondents' home city, Chicago. The Commission took testimony in eleven cities from coast to coast, and only in the three hearings conducted in Chicago were the witnesses subjected to cross examination. Of necessity, therefore, much loose, hearsay and generally inadmissible testimony found its way into the record. Some of this was stricken by the examiner upon respondents' motion (R. 49-63). The Commission's examiner found respondents guilty of unfair methods of competition despite his ruling on the evidence. Respondents thereafter filed their exceptions to his adverse report.

Curiously enough, although the Commission's attorney filed no objection to the examiner's ruling on the evidence and the Commission took no action except to confirm the examiner's findings by its own findings of facts and cease and desist order, petitioner at this too late date, argues the admissibility of this evidence. It contends that in any case, whether admissible or not, the testimony, although stricken by the examiner without objection on its part, is still a part of the record.

Having noted no exception to the action of the examiner, the Commission's attorney and likewise the Commission would appear to be estopped from disputing, more than seven years later, the ruling of its own examiner in this Court of last resort. In so far as the examiner had ruled favorably to respondents on their motion to strike, nothing further could be asked of them. Exceptions to the ruling were up to the Commission and its attorney. Not having been made up till now, they must be deemed waived. The cases cited by petitioner (Pet.'s Br., p. 30) have no reference to the situation here presented. In any event, the entire record, including the stricken testimony was before the court below.

imate sales method whereby the customer was told what he was to receive and how much he was to pay, and no misstatements or non-disclosures were involved.

In the case of *John C. Winston Co.* v. *Federal Trade Commission,* 3 F. (2d) 961,[12] involving facts similar to the situation in the instant proceeding and followed by the court below, the court laid down the following test:

> "The sole question is whether hidden in the transaction there is an inducement, based on an untruth, that the purchaser is getting ten volumes of the encyclopedia for nothing" (p. 962).

Using this practical test we can readily see that no such inducement is present in this record. Each purchaser was well aware and was made to understand that a substantial sum had to be paid in order for him to get the encyclopedia and the looseleaf supplements. The Commission's witnesses so testified.

B. Fraud not being proved, it cannot be presumed. The familiar fraud principles cited by petitioner are wholly inapplicable.

Petitioner having assumed that the combination "free on condition" representations constitute a fraud upon the purchasing public, cites all the familiar fraud and deceit principles. Respondents readily agree with the soundness of the principles announced and the application thereof to the cases cited, but the citation and repetition of fraud principles cannot spell out fraud where none exists and cannot make the facts involved in the question here in issue a suitable one

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12 This case is discussed at length *infra*, page 36 *et seq.*

for the application of those principles. Throughout its brief, there is not one citation of a case at law or in equity which is at all similar to the facts here disclosed. In every one, there is a definite fraudulent misstatement of a material fact and all the elements of common law frauds are present. In every one, fraud has been proved and has not been presumed.

Respondents, for example, agree that the "illegality of fraud is not cured by the credulity of its victims". But, this principle can have no bearing here because no fraud is involved or has been proved. Cases cited by petitioner to prove its principle of law demonstrate the disparity that exists between the facts involved in fraud cases, such as those cited at pages 43-44 of petitioner's brief, and in the "free on condition" method.

Thus, in *Bailey* v. *Smith,* 23 F. (2d) 977, the crooked vendor of a business deliberately falsified and exhibited to the buyer a padded list of accounts receivable to induce the sale. Naturally, the doctrine of *caveat emptor* was held to have no application, for the buyer was a victim of a cunning and vicious theft by fraud. Similarly, in *Strand* v. *Griffith,* 97 Fed. 854, a vendor of a stock of goods falsely represented the same to be new when in fact they were moth-eaten, old and shopworn. The vendor in addition, falsified an invoice and lied to the vendee that it truthfully showed the wholesale value of the goods at the market. This was, indeed, actionable fraud.

In *Pattiz* v. *Semple,* 12 F. (2d) 276, the seller of a hotel falsified and padded the statement of monthly income of the hotel and deliberately altered the books generally to lie about the financial condition of the

hotel. On the basis of these frauds, the vendee purchased the hotel. Such false representations to induce the sale were properly held to be fraudulent.

Mergenthaler Linotype Co. v. *Evans,* 69 F. (2d) 287, concerned a false statement that an old linotype machine which had been damaged by fire was in fact worthless. On the basis of this statement, the vendee purchased a new machine from the seller. In truth and fact, the old machine was not worthless. The lying statement was made by the agent merely to induce the sale of a new machine.

In *Keeler* v. *Fred T. Ley & Co.*, 65 F. (2d) 499, the sale of land was induced by a promise that a building would be erected to cost a certain amount. It was proved that the promissor had wilfully lied because he never intended to construct such a building.

O'Hara v. *United States,* 129 Fed. 551, was a criminal case that involved the use of the mails in a scheme to defraud. Under the pretense of having a system for betting on horses, money was obtained from gullible people. As a matter of fact, the defrauders did not bet, but pocketed the money and attempted to make the ridiculous defense that since the scheme was on its face impossible of execution, there was no fraud.

In *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516, it was held that the use of the term, "Syrup of Figs" to designate a laxative medicinal preparation, was unfair where fig juice was a very unimportant and unnecessary element in the composition of the preparation whose operative laxative element was senna and not "Syrup of Figs". In this case, it is

clear that the purchaser was deceived into believing that he was getting a fig juice laxative when in truth, he was not.

The case of *Barndt* v. *Frederick,* 78 Wisc. 1 (Pet.'s Br., p. 47), was a case of a clear cut and deliberate fraud in the sale of mining stock. Defendant represented to the purchaser that the mining company had $1,500,000 worth of ore ready for crushing. This was false. The defendant's attempt to squirm out of the fraud by claiming that the statement was too absurd and incredible, which drew from the court the language quoted by petitioner at page 47, could have no effect on the outcome since fraud was present in that case.

The case of *Florence Mfg. Co.* v. *J. C. Dowd & Co.,* 178 Fed. 73, was an ordinary passing off case wholly different from the facts in issue and held that the law is made for the public rather than merely for experts. This is not questioned.

Petitioner presses *Bailey* v. *Perkins,* 224 Mich. 27, (Pet.'s Br., pp. 44, 45), as a case directly similar to the instant one. The evidence in that case showed that a sale of a business was fraudulently induced by representing that certain material cost $700 when it only cost $400 and that some machines were new when they were rebuilt and that the business was prosperous when it was barely paying expenses. This case of rank fraud is hopelessly irrelevant to the instant case. *Smith* v. *MacDonald,* 139 Mich. 225, from which the *Bailey* case quotes at length was a stock fraud swindle of the worst kind.

In *Falter* v. *United States,* 23 F. (2d) 420, the Circuit Court of Appeals for the Second Circuit was

confronted with a criminal case involving a clear misstatement of facts. There the United States was defrauded by false representations made by a former Chief of the Textile Branch of the Surplus Material Division of the War Department to his successor in office that certain contracts with a company were unfilled and that therefore the company was entitled to receive more merchandise at a lower price. Judge Learned Hand, speaking for the court, declared (p. 424):

> "His false utterance concerned existing facts; *i. e.*, that the orders had been issued, and that the quantities they prescribed had not been delivered."

The defendant's guilt on the basis of the above could not be in doubt. Language used by the court in such a case and quoted by petitioner at page 45 of its brief can have no possible bearing upon our problem.

It is demonstrably clear from the cases cited by petitioner and commented on above, that the facts in not one of these cases can be held to be analogous to the facts here involved. Every case that is cited is predicated upon a defendant's fraudulent misstatement of a material fact. Placed side by side with the facts involved in the "free on condition" sales method, the propriety of the decision of the Circuit Court of Appeals refusing to hold the "free on condition" sales method unfair, is apparent.

C. The Winston and Consolidated Cases Analyzed.

There is no case of this Court in point. Prior to the decision of the court below, the only applicable

decision was that of the Third Circuit, in *John C. Winston Co.* v. *Federal Trade Commission* (C. C. A. 3) (3 F. (2d) 961), where the court held that the "give away on condition" sales method in the sale of encyclopedias was not an unfair method of competition because it contains no hidden inducement based on an untruth. Measured by ordinary standards of intelligence the court said, the method could not be unfair. The court declared in no uncertain language (p. 962):

> "The sole question is whether hidden in the transaction there is an inducement, based on an untruth, that the purchaser is getting ten volumes of the encyclopedia for nothing. This is difficult to believe when, obviously, he knows that the encyclopedia is the principal thing to which, of necessity, the services are merely incidental. It is conceivable that a very stupid person might be misled by this method of selling books, yet measured by ordinary standards of trade and by ordinary standards of the intelligence of traders, we cannot discover that it amounts to an unfair method of competition within the sense of the law."

The court below in its decision approved the *Winston* case and followed that decision. They refused to agree with the Commission that *Consolidated Book Publishers Inc.* v. *Federal Trade Commission* (C. C. A. 7) (53 F. (2d) 942), was a contrary decision but said that even if interpreted to be contrary, they preferred to agree with the Third Circuit Judges that the "bare practice" of offering goods "free on condition" that a customer buy something else, is not

an unfair method of competition within the sense of the law. Speaking of the decision in the *Consolidated* case, the court below stated:

> "* * * the case was complicated by a number of graver practices which probably colored the whole. We are not satisfied that stripped of these, the bare practice would have been held bad; if so, we prefer to follow the Third Circuit" (R. 489).

Only in the *Winston* and the instant case did the single method here involved, receive the consideration it deserved. In these two cases, the combination sales approach was examined independently of anything else. The sales method was tried on its own merits.

Since Question One of the Questions Presented by petitioner for decision by the Court concerns this sales method, independently and apart from anything else, this Court should likewise consider, as did the court below, only the "bare practice" of offering goods "free on condition".

In the *Consolidated Book Publishers, Inc.* case, *supra,* the method in question was not separately analyzed but was treated as part of the other and more serious practices there involved. Without attempting to evaluate the different parts of the Commission's order in that case, the Court of Appeals in the Seventh Circuit affirmed it in its entirety.

Despite the fact that the court below asserted that it was in harmony with the facts and the law of the *Winston* case, petitioner now insists that the *Winston* case is irrelevant in the consideration of, and utterly different from the instant case.

In the face of the following five indisputable facts of similarity, such an assertion is groundless.

First: The allegations of the complaint in the *Winston* case[13] charging the use of the "free on condition" method are practically identical with the allegations in the complaints at bar (R. 4, 23) as paragraph 2 of the *Winston* complaint clearly shows.

> "Par. 2. Said respondent in the course and conduct of its said business employs numerous agents and salesmen upon a commission basis in the various states of the United States and the cities thereof, to take orders for sets of 'Winstons Cumulative Loose Leaf Encyclopedia' in ten volumes, * * *. In the course and conduct of its said business said respondent by and through its agents, represents to its prospective customers that respondent will present free of charge its said set of encyclopedias upon the condition that such prospective customers will furnish letters of recommendation concerning the merits of said encyclopedias. As a condition precedent to availing themselves of this offer such prospective customers are required to subscribe to a so-called 'Cumulative Loose Leaf Annual Service' accompanying the said encyclopedias, which said service respondent, by and through its agent, represents it will thereafter furnish to the owners of the said encyclopedia so that information concerning current events may be obtained each year as supplementary to said encyclopedias. The price at which said service is to be furnished is represented by respondent through and by its agents to be the sum of $49, which said sum pays for the said service for the period of ten years, all of which $49 is to be paid within one year after the date of

[13] The excerpts from the complaint, findings and order of the *Winston* case are from Federal Trade Commission Decisions, Vol. 8, pp. 177-186.

the transaction in monthly installments. The said representation by said respondent, by and through its agent that the sum of $49 is in payment for the so-called Cumulative Loose Leaf Annual Service is false and misleading, as such sum is greatly in excess of the price at which said respondent can furnish said service to bona fide purchasers and is sufficient to compensate the said respondent for the set of encyclopedias sold to its customers, together with the accompanying service. In truth and in fact said customers of respondent, in subscribing to the extension service in the manner set out above is purchasing the said set of books and the extension service for the sum of $49 under the mistaken belief that he is receiving the said set of books free of charge and is paying only for the said service."

Second: The *Winston Company* stipulated, as petitioner notes in its brief (p. 55) that the Company through its

"agents and salesmen represented and still represent to the aforesaid purchasers and prospective purchasers that the said price of $49 represents the fair value of the said annual and research services, and that by obtaining not only the said services but also the ten volumes of the encyclopedia for that price the purchaser in effect would obtain the said *ten volumes free of charge.*"

Third: The Commission in the *Winston* case made findings of fact (which according to petitioner's brief [p. 82] are conclusive if *any* testimony is present to support them), repeating the above stipulated fact and adding the following details as to the "free on condition" method:

"The representations of respondent through its agents and salesmen to purchasers and prospective

purchasers that the sum of $49 represented or represents the value of the said Research and Annual or Revision services and that by obtaining not only the said services but also the ten volumes of said encyclopedia for that price, they in effect would obtain the said ten volumes free of charge has deceived and misled, and is deceiving and misleading to said purchasers and prospective purchasers, as tending to cause and causing the belief that said volumes are delivered free of charge, either by reason of a special contract or otherwise, when in fact the sum of $49 was at all times the real and customary selling price of the said three items, the ten volumes and the said Research and Annual or Revision services, and was sufficient to repay respondent the cost of production of the said 3 items together with a reasonable profit thereon" (8 F. T. C. Decisions, p. 185).

Fourth: The Commission's cease and desist order, in language similar to paragraphs 1 and 3 of the Commission's desist order in the instant case, forbade the *Winston Company* from directly or indirectly:

"* * * representing to purchasers and prospective purchasers that any part of a combination offer is in fact or in effect given free of charge when the recipient must pay a consideration for the whole or some element of the combination to be entitled to receive the alleged gift." (8 F. T. C. Decisions, p. 186).

Fifth: The court on the basis of the pleadings and the findings of fact of the Commission, vacated the order and stated that in their opinion there was nothing hidden or untruthful in the sales transaction,

and that consequently it did not "amount to an unfair method of competition in the sense of the law".

The foregoing five facts demonstrate the obvious similarity between the *Winston* case and the instant one as far as the "free on condition" sales method is concerned, and deprive petitioner of any ground for a supposed distinction between the two cases. The same facts and issue were involved, and the same result was reached in both. It must be conceded that the court below thought so when they wholly agreed with the reasoning expressed in Judge Woolley's opinion in the *Winston* case.

Although the Commission's desist order sustained in the *Consolidated* case did have a paragraph similar to the paragraphs eliminated from the instant order by the court below, this was practically the identical paragraph held not to state an unfair method of competition by the Circuit Court of Appeals for the Third Circuit in the *Winston* case.

It is submitted that the opinion of the Circuit Court of Appeals in the *Consolidated* case should not be regarded as an authoritative opinion as to the "bare practice" of the "free on condition" sales method.

The decision of the court below and of the *Winston* case, dealing solely with the issue here involved, correctly ruled that the universally accepted combination sales method of giving goods away "free on condition" that others are bought, does not constitute an unfair method of competition within Section 5 of the Federal Trade Commission Act.

In concluding the most important point in the case, we wish again to emphasize to the Court that the sole question to be decided under this point is found in

Question One of the Questions Presented by petitioner, *i. e.*, Is the "free on condition" sales method, by and of itself, an unfair method of competition? To that question and to it alone, have we directed the foregoing discussion of the law and facts. We respectfully submit that it has been established beyond a doubt that the court below was justified in reversing paragraphs one and three of the desist order. It is clearly not unfair for a merchant to offer to give away one thing on condition that the customer buy something else. This is a legitimate trade practice that has continued uninterruptedly from time immemorial. The method is not fraudulent, deceitful or against public policy.

POINT TWO.

The court below committed no error in excluding Ward from the seventh and ninth paragraphs of the order and in reversing the order entirely as to Greener.

[Answering Petitioner's Point III.]

Despite petitioner's pretentious argument under its Point III, all that it complains of is the lower court's elimination of respondent Ward from two paragraphs of the desist order, the seventh and ninth, and of the total elimination of the employee respondent, Greener.

The court also ruled that respondent Stanford was not properly included in paragraph tenth, but petitioner has now elected to abandon this issue along with several others (Pet.'s Br., p. 66).

Petitioner relies upon two theories of law namely (1) that persons who manage corporate affairs can-

not escape liability for unlawful acts which they personally control and supervise by hiding behind the corporate entity, and (2) that injunctive decrees should be as broad as necessary to prevent evasion. It claims that under the first theory, the order should have been affirmed as to Stanford and Ward, and that under the second, as to Stanford, Ward and Greener.

The court below did not controvert the validity of these theories. In fact, they declared the first to be the one governing this case and cited many of the cases petitioner now needlessly puts forward to support its contentions. Nor do respondents, at this time, quarrel with the theories propounded.

Respondents had indeed cited authorities and argued in the court below that the three respondents were improperly included as parties to these proceedings in their individual capacities, on the grounds that nothing was pleaded in the complaints or proved at the hearing justifying any personal liability on their part.[14] But, only as to employee respondent, Greener, was the contention fully sustained. The court believed him to be "merely the auditor and in charge of the companies' finances", having "little or nothing to do directly with trade practices" (R. 488), and the order was accordingly reversed as to employee Greener. Concerning respondents, Stanford and Ward, the order was for the most part affirmed.[15]

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14 A separate motion was made in the court below to dismiss the complaints as to the individuals, because the complaints were fatally defective in that no unfair methods of competition were alleged against them as individuals, all acts pleaded being corporate acts (R. 473).

15 As explained, *supra*, page 11, respondents do not and cannot at this time urge the issues decided unfavorably to them. The court's refusal to reverse the entire order as to Stanford and Ward, as well as Greener, is one of these issues from the argument of which respondents are at present foreclosed.

As to Ward.

The court, in arriving at its decision by applying the rule embodied in petitioner's first theory and conceded to be correct, found that there was no evidence that Ward personally controlled and supervised the acts prohibited in the seventh and ninth paragraphs of the desist order, and consequently, he was held not to have been properly included therein. That Ward may have known in a general way of the practices does not make him responsible therefor. The publication of a list of contributors (par. seventh) and of testimonials (par. ninth), was not his concern (R. 424, 453). He had nothing to do with the administration and publishing end of the business, that was Stanford's job (R. 399).

The agents in the field in demonstrating the books may have exhibited the list of contributors and the testimonials, but the agents were the agents of the Standard Education Society and not of W. H. Ward individually (see *National Cash-Register* v. *Leland,* 94 Fed. 502, 508). Clearly therefore, as the court below held, Ward cannot be held personally liable for the acts of the agents of the corporation relative to paragraphs seventh and ninth of the desist order, for there is nothing in them that can be traced to him personally. The conduct prohibited by these two paragraphs was thought by the Court of Appeals to be "amply connected" with Stanford, but they could not see "that Ward was involved" (R. 491).

It is further contended by petitioner that although ordinarily direct evidence of control and supervision over the conduct complained of may be necessary to sustain personal liability, no such evidence is necessary here because Stanford and Ward were in com-

plete control of the corporation and were its controlling stockholders. The Court should remember that the Standard Education Society, the corporation here involved, has been in existence for over 25 years. Here, we do not have the type of case petitioner attempts to have the Court believe it to be by citing cases like *Saxlehner* v. *Eisner,* 147 Fed. 189. In that case, the corporation was but the cover for the individuals' enterprises, a device to be used by them for the pirating of plaintiffs' labels. In reality, in such a case, the corporation is not a thing of substance; it is "fly by-night", and merely used as a cloak to avoid personal liability. Similarly, in the *National Cash-Register* case (94 Fed. 502), the defendant corporations were organized for the very purpose of infringement, and were mere sham corporations formed by the individuals as a shield for their operations.

The same is true of the other cases cited by petitioner. Certainly there is no analogy between the case of *McCandless* v. *Furlaud,* 296 U. S. 140, cited by petitioner (Br., p. 67), and the case at bar, for there, the individual Furlaud was the "head and front of the conspiracy" perpetrated by various corporations all dominated by him and formed for the particular purpose of defrauding the public.

The Standard Education Society is a substantial corporation and has been in existence since 1909 with varying stockholders, directors and officers. As a matter of fact, the record shows that prior to 1929, the year when testimony was taken, there were a great number of stockholders who were sales directors, managers and field salesmen (R. 406). Since the acts complained of in the complaints (R. 2, 20) covered the five year period from 1924 to 1929 during which time there were many stockholders besides Stanford

and Ward, it is certain that this case presents no instance of a corporation dominated and controlled by one or two men during the times alleged in the complaint.

Clearly, this is not a case where the individuals must be held responsible for the acts of the corporation and the corporation's agents as though the business were conducted by the individuals or as a partnership. The corporation here is a substantial, sound and solvent entity that has conducted a useful business for many years through many men along lawful and legitimate lines. The cases cited by petitioner are distinctly not in point. The Court of Appeals properly excluded Ward, as an individual, from the prohibitions of paragraphs seventh and ninth of the desist order, because there was no evidence to support his inclusion therein.

As to Greener and the Incorporation of Standard Encyclopedia Corporation.

Petitioner's second theory under which it contends that employee Greener as well as Stanford and Ward were properly included in the order is that their inclusion in the order was necessary to prevent evasion. Granted that injunctive decrees should be as broad as necessary to prevent evasion, the theory is utterly fantastic in relation to the present situation. The Commission's Finding 20 (R. 76) is completely the result of its imagination and has no testimony to support it. Petitioner admits (Br., p. 74) that the only "evidence" relative to Finding 20 is Stanford's plausible—and truthful—account of the corporation of the Standard Encyclopedia Corporation under the "not for profit" Illinois eleemosynary statute, all of which belies the Commission's pretended finding.

Although no evidence in the record contradicts what Stanford said, petitioner contends that the Commission had the power to infer that Stanford was prevaricating and that the incorporation of the Standard Encyclopedia Corporation was for the purpose of evading an order about to be issued against the Standard Education Society. Petitioner also contends that such inference cannot be disputed by the Court of Appeals, although the record presents no evidence to support the Commission's finding but only evidence to contradict it.

Surely, when this Court ruled in the *Algoma Lumber* case, 291 U. S. 67, that where there is a great deal of disputed testimony before the Commission, the Court of Appeals must accept the Commission's findings and not weigh the mass of evidence to determine the preponderance thereof, they did not mean to rule that any finding of the Commission, even if depending for support solely upon inference from testimony contradicting the finding, should be controlling upon the Court of Appeals.[16]

The Courts of Appeals are directed by statute to supervise the Commission's proceedings and Congress certainly never intended that the Circuit Court of Appeals should act as a rubber stamp for the Com-

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[16] In the case of *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, cited by petitioner (Brief, p. 70), and relied upon by this court in the *Algoma Lumber Co.* case, 291 U. S. 67, 73, the court demonstrated that more than merely "negative" evidence or an inference based thereon is necessary, to support a finding. The facts in the case were stipulated and the court stated (p. 63):

> "The weight to be given to the facts and circumstances *admitted*, as well as the inferences reasonably to be drawn from them, is for the Commission. Its conclusion that the habitual use of the established list lessens competition and fixes prices in interstate territory cannot be said to be without *sufficient* support." (Italics ours.)

mission. This Court has never declared that the Courts of Appeals' role in Federal Trade Commission proceedings is of such a supine nature. To the contrary, the Court has repeatedly asserted the Courts of Appeals' supervisory power over the activities of the Commission.

Federal Trade Commission v. *Klesner,* 280 U. S. 19, 27;
Federal Trade Commission v. *Raladam,* 283 U. S. 643, 648;
International Shoe Co. v. *Federal Trade Commission,* 280 U. S. 291, 299;
Federal Trade Commission v. *Gratz, et al.,* 253 U. S. 421, 427;
Federal Trade Commission v. *Curtis Publishing Co.,* 260 U. S. 568, 579, 580.

An analysis of the organization of the Standard Encyclopedia Corporation will demonstrate that, as a matter of fact and law, there could have been no basis for the Commission's fear that its incorporation was a device to evade any order that would be issued against the Standard Education Society.

The testimony of Mr. Stanford dispels any sinister motive behind the incorporation of this eleemosynary non-stock corporation. Although the three individual respondents were its incorporators, it was organized for and on behalf of the Standard Education Society, solely for the latter's benefit and corporate use, to meet the need for change in the name of the encyclopedia.

As has been pointed out heretofore (p. 7), in 1929, the two volumes of teacher material were dropped from the Reference Work and the scope of the set was enlarged and expanded to cover strictly encyclo-

pedic matter. It seemed then appropriate to call the work an encyclopedia, and the name, New Standard Encyclopedia was chosen.

It was intended that the name of the corporation would be changed as had been done in 1917 without the necessity of a new corporation. However, as Mr. Stanford explained, because of banking arrangements, this was impossible at that time. The new corporation "not for profit" was therefore incorporated, bearing the name of Standard Encyclopedia Corporation, under the Illinois eleemosynary corporation law.

The new corporation was not an independent financial entity. It was nothing more than a trade department of the Standard Education Society which remained the sole financial and real entity, handled all the sales and business, collected all the accounts and did everything else (R. 405). Not a single word of testimony points to any other purpose. This is conceded by petitioner (Br., p. 74). It is argued, however, that the Commission did not believe Mr. Stanford and that its finding was properly based on this disbelief.

Since the record warrants no justification for the disbelief and Finding 20 is admittedly supported by no affirmative evidence, it is submitted that the finding is erroneous.

Legally, the Standard Encyclopedia Corporation, as an appendage of the Standard Education Society, with no independent existence and organized under the non-profit Illinois statute could not in any event be used to evade an order against the Standard Education Society. Such an order without more, would bind its officers, agents and employees.

Hutter v. *De Q. Bottle Stopper Co.* (C. C. A. 2), 128 Fed. 283, 286.

The Standard Encyclopedia Corporation was organized by respondents not as individuals, but as officers of the Standard Education Society and by orders of the latter corporation (R. 404). Obedience to an injunctive order cannot be evaded by a corporation through the incorporation by its officers of another company. The Commission well knows this, for in the case of *Federal Trade Commission* v. *Hoboken White Lead and Color Works, Inc.*, 67 F. (2d) 551. the Second Circuit Court of Appeals at the instance of the Commission, held a New Jersey corporation guilty of contempt when it formed a New York corporation and its New York corporation, having the same stockholders and officers, sold paint under labels which the New Jersey corporation had been ordered to cease using.

Thus, the incorporation of the Standard Encyclopedia Corporation offers absolutely no basis for the evasion fears expressed by the Commission because as a matter of law, evasion was impossible by this device and because as a matter of fact, the new corporation was established for a legitimate corporate reason.

Greener Merely an Employee.

The respondent, Greener, who happened to be one of the incorporators of the new corporation, was a mere employee of the Standard Education Society who owned 35 shares of stock of that corporation. An examination of his entire testimony found on less than one page of the record (pp. 426-427) reveals that his position is strictly that of an employee. He was comptroller, auditor and manager of the bookkeeping department (R. 467). He is not a director of either corporation. The testimony is conclusive that al-

though Mr. Greener owned 35 shares of the Standard Education Society stock, his position was that of a chief bookkeeper, and his activities were such as are generally done by the head bookkeeper o. any large corporation and as far removed from the acts alleged in the complaints as possible.

The Commission's desist order was properly reversed as to employee Greener. The incorporation of the Standard Encyclopedia Corporation, under the law and facts did not justify the inclusion of the individual respondents in the Commission's order to cease and desist.

It therefore conclusively appears that the court below in eliminating Greener entirely from the order and Ward from paragraphs seventh and ninth of the order committed no error.

POINT THREE.

The Court's modification of paragraph seventh of the Commission's order was necessary and reasonable.

[ANSWERING PETITIONER'S POINT V]

The court below, in referring to paragraph seventh, decided that it is proper to list as genuine contributors to a revised work (the present encyclopedia) those who contributed to the basic work (Aiton's Encyclopedia) and they therefore rightly held that this paragraph of the Commission's order which forbade representing anybody as a contributor who was not a contributor, should be "modified or clarified" to exclude from its terms, contributors to Aiton's Encyclopedia, the derivative work of respondents' present publications (R. 490).

The Government evidently agrees that it is permissible so to list contributors, but now argues that the modification was,—"(1) unnecessary, if its purpose was to permit use of the names of contributors to Aiton's Encyclopedia whose work was taken over, and (2) unjustifiable, if its purpose and effect was to permit false representations to be made as to contributors whose work had been entirely eliminated" (Pet.'s Br., pp. 78, 79). That the modification of paragraph seventh was both necessary and justified was demonstrated by the court below.

As to (1)—Contrary to the Government's concession (Pet.'s Br., p. 78), the Commission's findings (Finding 17, pp. 74, 75) indicated that contributors to Aiton's Encyclopedia whose contributions were carried over to the present works could not in its opinion, be correctly listed as contributors to the present works.

Commission's witnesses, Rankin and West, had written extensively for Aiton's Encyclopedia and their material, although revised, still formed parts of the derived work. These two men showed by their testimony, the justification for their inclusion in contributors' listings of the revised publications (R. 260-262, 264-267).

All that the court's modification aims to do is what the Government itself concedes the order should not cover.

Moreover, the Commission, in the court below, argued that these men, although contributors to Aiton's Encyclopedia, and even if their work had been carried over to the present publications, were improperly listed as contributors. Thus, if paragraph seventh had not been modified, the Commission would have believed that the order prevented respondents from

advertising as contributors, writers of material originally in Aiton's Encyclopedia, which remained in the newer editions of the revised work. Since the Commission did not then interpret paragraph seventh as it now does, the court below felt that the modification was, in full fairness to respondents, very necessary and important.

As to 2,—There is nothing in the Commission's findings or in the evidence that gives the petitioner the right to infer that all the work of any contributor to Aiton's Encyclopedia was "dropped completely" from the subsequent revisions, nor does it even "seem clear" as the Government's brief puts it, that "some of it was completely eliminated" (Pet.'s Br., p. 78).

The need for modification and clarification was succinctly and cogently stated and answered by the court's opinion:

> "The seventh clause forbade representing as contributors or editors those who had not contributed to, or edited, the publications. Its propriety depends upon the evidence, and while there is not much of it, it definitely does appear that there was no warrant for claiming at least two, Ballou and Pace, as either contributors or editors. There were, however, a number who had been genuine contributors to 'Aiton's Encyclopedia', but who had done nothing later. How much of this earlier work went into the two later ones cannot be definitely ascertained, but it was the basis of them, and it seems to us not 'unfair' to announce as contributors to the derived work those who had been contributors to the original. This clause ought, therefore, to be modified or clarified by excepting from the prohibition contributors to 'Aiton's Encyclopedia'" (R. 490).

Respondents respectfully insist that the court's modification of paragraph seventh was necessary and reasonable, and affords petitioner no sound basis for complaint.

POINT FOUR.

Paragraph eighth with no support in the findings or in the evidence was correctly reversed. Circuit Courts of Appeals are not supposed to be Commission's marionettes.

[ANSWERING PETITIONER'S POINT V.]

Paragraph eighth was found by the court below to be without support in the testimony and was therefore reversed. This paragraph prohibited the representation that any person had recommended respondents' publications when such was not the fact.

A separate paragraph of the order, paragraph ninth, forbade the use of testimonials which, though really given, had been revised so as to be substantially untrue. The Court of Appeals believed that paragraph ninth was supported by evidence and affirmed it. That decision, we cannot, at this time, dispute. For present purposes, we must assume it to be correct. But the affirmance of paragraph ninth gives no license to petitioner to iterate and reiterate the proscription contained therein and the evidence to support that paragraph as reasons to sustain the unsupported paragraph eighth (Pet.'s Br., pp. 79, 80). The single question under this point must concern only the paragraph reversed, paragraph eighth, the testimony, if any, and the finding pretending to support that paragraph.

The court was compelled to reject the eighth paragraph which was not only unsupported by the Commission's finding, but was void of any testimony to support it. The nearest approach to anything even bordering upon a finding is Finding 15 (R. 73) which presumed to find as a fact that the representations that Paul R. Byrne, O. M. Cope, Stanley L. Clark, J. F. Montague, Charles J. Higgs and Elizabeth Kenney gave recommendations for the New Standard Encyclopedia, are false, deceptive and misleading. But all these persons admittedly recommended and gave testimonials for the Standard Reference Work (R. 466), the immediate predecessor of the New Standard Encyclopedia (which the Commission also found was only "the old Standard Reference Work revised" (R. 74)). Accordingly, the Commission by its own admission had incorrectly found without evidence that the above named persons had not given testimonials, for each of them had positively done so, and was therefore correctly so represented.

As the court stated concerning this paragraph,

> "For the eighth, which forbade the use of such testimonials which had not been given by the person whose name was used, we have been able to find no support in the evidence; and we are referred to none except the conclusions of one, Nixon, which are outweighed by her identification of the handwriting of the person whose name was used" (R. 490, 491).

The Government claims that the court was foreclosed by Section 5 of the Federal Trade Commission Act from weighing this testimony of Miss Nixon's relating to the acts and declarations of her deceased

employer, Mr. Brown, as to matters that happened seven years prior to the taking of testimony. It urges that the court committed grievous error in so doing, and cites the *Algoma Lumber Co.* case as authority for the proposition that the Circuit Courts of Appeals were mere marionettes of the Commission.[17]

It is submitted that this Court has never gone so far as to condemn the Circuit Court of Appeals, in reviewing the acts of the Federal Trade Commission, for refusing to consider hearsay, inadmissible testimony in support of an order.

Miss Nixon's testimony is one of the outstanding examples of hearsay that saturates the record. It is an attempt to make one dead man speak directly contrary to what he wrote in his lifetime endorsing respondents' encyclopedia. (See Respondents' Exhibit 1.) To use such evidence as the only proof to support the eighth clause of the order, puts the finger of unfairness upon the Commission's exaggerations in no uncertain terms. Since this legally inadmissible testimony was the only testimony in support of paragraph eighth, the court below, with entire propriety, reversed the paragraph and declared that they could find no evidence to support it. An order to cease and desist cannot, of course, be binding unless supported by findings based upon legally admissible testimony.

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568;
International Shoe Company v. *Federal Trade Commission*, 279 U. S. 832;
Arkansas Wholesale Grocers Ass'n. v. *Federal Trade Commission*, 18 F. (2d) 866, 871.

[17] This question is discussed *supra* (p. 48), where it is shown that the *Algoma Lumber* case is not authority for such a principle.

Conclusion.

It has been conclusively established that the court below properly reversed paragraphs One and Three of the Federal Trade Commission's order to cease and desist, because the combination, "free on condition" sales method is not an unfair method of competition in commerce. No error was committed by the court in excluding employee Greener entirely from the order, and Ward from the Seventh and Ninth paragraphs, for lack of any evidence to support their inclusion. Paragraph Eighth was properly reversed because there is no evidence in the record to sustain it. Further, the modification of paragraph Seventh was reasonable and necessary.

Petitioner therefore has no just complaint in so far as the desist order was modified. It is respectfully submitted that the Court should affirm those parts of the decision of the Court below under review at this time.

HENRY WARD BEER,
Counsel for Respondents.

October, 1937.

Appendix.

The Appendix contains the eight following representative prevailing "combination" advertisements, offering to give one article away "free" on condition that the customer buy another article:

(1) Life, August 23, 1937—To get "The Decameron" *free,* a customer must agree to *purchase* twelve books for one year at $1.69 a book and join the De Luxe Editions Club.

(2) New York Post, March 27, 1936—The bookcase is given *free* with *purchases* of $9.95 or more.

(3) New York Times, September 13, 1936—To receive "Seven Pillars of Wisdom" *free,* a person must join the Book-Of-The-Month Club which obligates him to *purchase* at least four books during the ensuing year.

(4) Drug Topics, September 13, 1937—Zonite offers the measuring glass *free,* if one *buys* a bottle of Zonite.

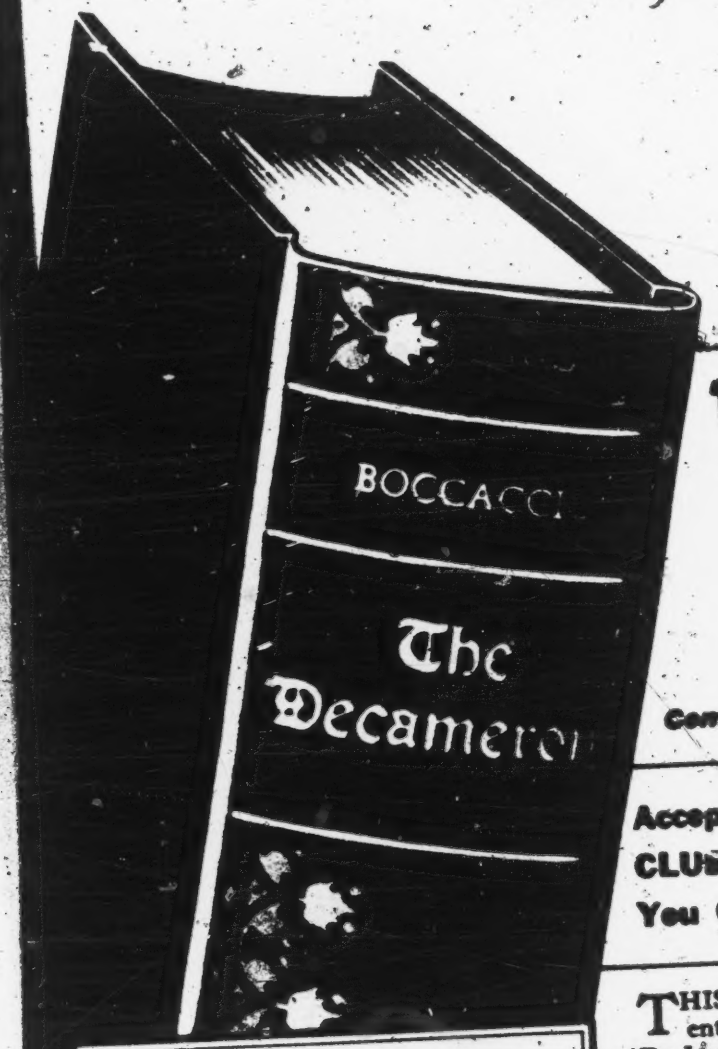
(5) Saturday Evening Post, April 25, 1936—A *purchaser* gets a moth bag *free* if he *buys* a pint can of Flit.

(6) Saturday Evening Post, April 25, 1936—Masland gives a rug *free* with every *purchase* of a room size rug.

(7) The Digest, August 28, 1937—To receive "The World and Man" *free,* a reader must join the Literary Guild of America and agree to *purchase* a minimum of four books a year.

(8) New York Evening Journal, May 27, 1936—A *free* bungalow is given away to each subscriber who *purchases* four lots and pays $96.50 for each lot or a total of $386.

Life August 23, 1937



Free

THIS FAMOUS DE LUXE EDITION OF THE DECAMERON

Printed from the Plates of the $17.50 Private Edition

Complete and Unabridged—Over 600 Pages—16 Illus. in Full Color and Gold

Accept This GIFT Volume as an Example of DE LUXE EDITIONS CLUB Bargains—Great Books Like This, Formerly $5 to $25, Which You Can Now Get in Exquisite New Editions for ONLY $1.69 Each!

THIS magnificent volume is being sent entirely free to new members of The De Luxe Editions Club. Membership will also bring you, each month, a striking new De Luxe Edition of a great book formerly priced at $5 to $25—for the one *standard price* of only $1.69 each! Furthermore, Charter Memberships in the Club are still open and new members need pay *nothing* to join!

Ten thousand other people have already joined the Club. As a Charter Member you pay no dues or assessments of any kind. You receive a free subscription to the magazine published for Members exclusively. And you are *guaranteed*, during your membership, against any increase in price.

The books you will receive are not quickly-forgotten novels. They are works of outstanding interest and lifelong worth. Books which will become "foundation books" in the thoughtfully planned, constantly growing library you have always longed to acquire. Books of lasting importance, representing a liberal education in particular subjects of endless fascination—sumptuous editions of famous works on literature, art, music, history, science, travel.

America's Greatest Fine Book Bargains

Throughout the country, De Luxe Editions Club books are already famous for their luxurious bindings, rich contents, permanent value. In size they average 6" x 9¼". Frequently they are even larger. Their pages, numbering from 500 to 600 to often over 1000, are in many cases gorgeously illustrated in color with paintings by the foremost artists; at other times with fine drawings and photographs. And every volume is *complete, unabridged*.

How are such values possible? Only because America's leading publishers are allowing the Club to use the *original*, first-edition plates of modern books—or, as in the case of "The Decameron," the plates of special, private editions. And contemporary authors have agreed to smaller royalties.

What are a few typical examples of these remarkable values? Recent De Luxe Editions have included such bargains as "Great Works of Art," *formerly $5.00*; Chaucer's "Canterbury Tales," in modern English, and with 25 full-page drawings in color by Rockwell Kent, *formerly $25.00*; "The Book of Old Ships," illustrated by the famous marine artist Gordon Grant, *formerly $20.00*; and "Stories of the Great Operas," *formerly in three volumes at $10.50*. Similar values will be offered in coming months—*all* at the standard low price (guaranteed to Members only) of $1.69 each, plus few cents postage.

SEND NO MONEY

We believe that you, like ten thousand others, will be glad to acquire a beautiful library of de luxe books at such remarkable savings. Surely you, too, wish to build up a permanent collection of volumes that will delight you always, and inspire your children in the years to come. Therefore we invite you to accept, free, a Charter Membership in The De Luxe Editions Club!

Send no money with the Special Gift-Book Coupon Below. Your *free* copy of "The Decameron" will be sent to you at once. With it will come the current month's bargain selection and the current issue of the Club's "Folio" a monthly magazine of interest to all book-lovers. "The Folio" is free to Members only. Each month it tells unusual facts about the current Book Selection. And it reviews the coming month's selection as well. Thus Members always know in *advance* what the next book will be. Your subscription for "The Folio" will begin at once, without cost. Mail the coupon below!

THE DE LUXE EDITIONS CLUB
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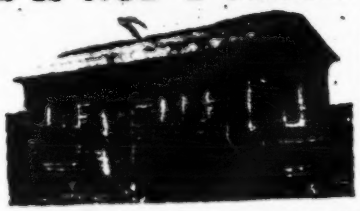

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